BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE A. GARZA	)	
Claimant	)	
	)	
VS.	)	
	)	
FARMLAND NATIONAL BEEF PKG. CO.	)	
Respondent	)	Docket No. 1,019,876
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the December 21, 2004 preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

At the preliminary hearing held on December 17, 2004, the Administrative Law Judge (ALJ) indicated claimant was seeking medical treatment and payment of medical bills. Claimant noted that was correct but because respondent denied the claim pursuant to K.S.A. 44-501(d)(1) the primary issue was compensability of the claim.

On December 21, 2004, the ALJ entered the Order Denying Medical Treatment which simply stated: "Claimant's request for medical treatment and payment of medical bills is hereby denied."

The claimant requested review noting the basis for the denial of medical treatment was not stated in the ALJ's Order Denying Medical Treatment. But claimant assumed the decision was based upon a finding, pursuant to K.S.A. 44-501(d)(1), that the accident was caused by the willful failure of claimant to use a guard or protection.

Respondent also briefed the matter based upon a finding that claimant failed to follow appropriate lock out/tag out procedure when injured working on a machine. Respondent requests the Board to affirm the ALJ's Order Denying Medical Treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

If the ALJ denied the benefits because the evidence failed to prove the claimant was temporarily totally disabled or needed medical treatment, the Board does not have jurisdiction to review this preliminary hearing Order Denying Medical Treatment.[1] However, if the benefits were denied based on the claimant's willful failure to use a guard, the defense raised by the respondent, the Board does have jurisdiction pursuant to K.S.A. 44-534(a)(2) to review the preliminary hearing Order Denying Medical Treatment.

The ALJ's cursory finding does not inform the parties nor the Board as to her reason for denying the requested benefits. The Board could remand this case to the ALJ for a specific finding as to why the benefits were denied. It would clearly benefit the parties as well as the Board for the ALJ to make a specific finding regarding compensability. As demonstrated by this case, whether the ALJ found the claim compensable is frequently the determinative issue as to whether the Board has jurisdiction to review the decision.

But in the interest of judicial economy and, more significantly, because of the manner the issues were framed and the matter litigated, the Board concludes the ALJ determined the case was not compensable because of the K.S.A. 44-501(d)(1) defense raised by respondent. The respondent has raised a "certain defense," i.e., claimant's willful failure to follow safety procedures or claimant's willful failure to use a safety device or guard. If respondent meets its burden of proof on those issues the claimant would be denied compensation. Accordingly, the Board has jurisdiction to review the issue raised by claimant.

The claimant was employed in the maintenance department for respondent. His job duties included repair and maintenance of the machines in the plant. On September 7, 2004, claimant was sent to repair a machine because the feed belt wasn't running. Claimant went to the machine and first disconnected the power source to the machine at the breaker and then unplugged the machine. The claimant then removed a panel covering the chains and gear sprockets. The claimant also removed the discharge belt assembly and placed it out of the way. Upon observation the claimant determined the chain and sprockets appeared in line.

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[1] See K.S.A. 44-534(a)(2).

The claimant decided that he needed to observe the chain and sprockets running to see if he could identify the problem. This required the claimant to restore power and turn on the machine. The claimant then walked back around the machine to observe the chains and sprockets which appeared to be properly operating.

As claimant stood next to the operating chains and sprockets, he looked down at the discharge belt assembly that he had removed while the machine was turned off and thought that a shear key on that piece of equipment was not properly installed. The discharge belt assembly was not running because claimant had removed it. Claimant reached into his tool pouch to get his channel lock pliers to work on the shear key and felt a jerk on his hand and a tug on his finger. Claimant did not feel any pain but did feel warmth and something dripping between his fingers. When claimant looked down his glove was crimson with blood. Claimant then realized that in the close quarters when he had moved his glove had got caught in the chain and drawn his finger in between the chain and sprocket on the part of the machine that was running.

Claimant was taken to the emergency room for treatment of his lacerated finger. But respondent ultimately denied the claim because of its contention that claimant had not followed appropriate procedure when he failed to unplug and lock out the machine.

It is undisputed that respondent has a policy that as maintenance crew members work on machines they are to tag out/lock out the electrical power to the machine so that it cannot be accidentally turned on while it is being serviced or repaired. It is also clear that a machine can under certain circumstances, simply be unplugged to achieve the requirement that a machine not have power to it.

It was disputed whether in this case it was appropriate to unplug the machine because the assistant safety director stated that unplugging a machine is only appropriate when the cord is within the reach of the individual working on the machine. In this case the cord was apparently on the opposite side of the machine where claimant was observing the chains and sprockets. But claimant argued that he had been taught it was appropriate to merely unplug a machine as long as he was in control of the power cord.

It was further undisputed that it was appropriate procedure to power up the machine in order to observe the equipment while it was running in order to identify the cause of the malfunction. The respondent's assistant safety director noted that with all the guards and shields taken off it is at times appropriate and necessary to turn the equipment on in order to check its operation. In fact the respondent's assistant safety director noted it was correct procedure to turn the machine on to check the alignment of the chains and sprockets just as claimant had done in this case.

But it appears that respondent treated the incident as one where claimant then tried to perform repair on the running equipment before again disconnecting the electrical power to the machine. As previously noted, the claimant had moved in order to get his pliers to

make an adjustment on the piece of equipment which was not running because he had removed it from the machine. In the close quarters, as claimant reached for a tool in his pouch, his glove did get caught in the machine parts that were running. The distinction is that claimant may have been standing too close to the exposed chains and sprockets which were running but he was not working on that piece of equipment while it was running. The claimant testified:

> THE COURT: Sir, we understand that. But you still haven't answered his question. What were you getting your channels [sic] locks for, what purpose?
>
> A. I was going to pull the sheer [sic] key on that - - on the pen, [sic] on that belt that I had apart that was sitting away from the machine.
>
> Q. (BY MR. McQUEEN) With the machine running?
>
> A. The machine was not powering this piece. This piece was inanimate. It was inoperable. It was totally disassembled from the machine. It was in a whole separate section.[2]

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

In order to deny benefits for failing to use a safety guard or for performing prohibited activity, Kansas law also requires that such activity be done willfully with a headstrong or stubborn disposition. The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[3] and the Kansas Court of Appeals in *Carter*[4] defined "willful" to necessarily include:

> [T]he element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' (Webster's New International Dictionary)[5]

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[2] P.H. Trans. at 23-24.

[3] *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920).

[4] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[5] *Id.* at 85.

The violation alone of instructions from an employer is not enough to render the employee's actions "willful" as a matter of law under K.S.A. 44-501(d)[6]. In *Thorn*[7], the employee, while operating a crusher, used a short stick or lath in order to pry ore between the rollers of the crusher. In the process his hand was pulled into the machine and severely injured. This was contrary to the rules of respondent which obligated the employee to use a long-handled maul for the purpose of breaking up these pieces of ore. Claimant admitted he used the stick "unthoughtedly" as he had seen other workers using the stick in the same manner. The actions by the claimant were not found to be "willful" under K.S.A. 44-501(d).

In this case, claimant had restored power to the machine in order to observe what was malfunctioning. There is no dispute that his actions in this regard were recognized as appropriate procedure. Moreover, the tag out/lock out safety procedure was inapplicable at this point because the power obviously had to be connected in order to operate the machine. As claimant stood next to the machine observing operation of the chains and sprockets, he looked away and noticed that a piece on a part of the machine which had been removed and was not running appeared to be incorrectly installed. As claimant moved to get a tool to fix that problem he got too close to the running equipment and his finger was pulled into the chain and sprocket.

If claimant was trying to work on the chains and sprockets which were running, he would have arguably been in violation of safety procedure as well as the tag out/lock out procedure. But in this case, the claimant was not trying to work on the machine that was running. While claimant may have been negligent in standing too close to the moving chains and sprockets, such activity cannot be said to have been in willful disregard of the use of safety guards or procedure.

The Board finds respondent did not meet its burden of proof to establish claimant had, pursuant to K.S.A. 44-501(d)(1), willfully failed to use a guard or safety device. The Board further finds the claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent and is entitled to medical compensation for the injuries he suffered as a result of his work-related accident.

WHEREFORE, it is the finding of the Board that the Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller dated December 21, 2004, is reversed.

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[6] *Hoover v. Ehrsam Company.*, 218 Kan. 662, 544 P.2d 1366 (1976).

[7] *Thorn v. Zinc. Co.*, 106 Kan. 73, (1920)

The respondent failed to meet its burden of proof to establish claimant willfully failed to use a guard or safety device for protection against the accident. The Board further finds claimant suffered accidental injury arising out of and in the course of his employment with respondent and remands the case to the ALJ for further order consistent with the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

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BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Kerry E. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director